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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

Marcia P. Dykes,

Petitioner,

v.

Northern Virginia Transportation District Commission
and
Board of Supervisors of Fairfax County, Virginia,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Virginia

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are the due process guarantees of the Fourteenth Amendment violated when the highest court of a state, less than a week before oral argument on a rehearing, abolishes and substantively alters that court's long established and published procedures for rehearing which had been relied on by the respondent at all critical phases during the pendency of the rehearing?

2. Are the due process guarantees of the Fourteenth Amendment violated when the highest court of a state grants a rehearing to a petitioner without allowing the respondent an opportunity to reply before the petition is granted?

3. Do the due process guarantees of the Fourteenth Amendment require that, in certain instances, a rehearing of a decided case by the highest court of a state be heard only by those justices who rendered the original opinion?

4. When the appellate authority of the highest court of a state is founded solely on statutes enacted by the legislature, are the due process guarantees of the Fourteenth Amendment violated when that court grants a petition for rehearing of a decided case, and deliberately does not comply with the statute governing the grant of rehearing petitions?

PARTIES

The appellants in the Supreme Court of Virginia were Marcia P. Dykes (the petitioner here) and Osgood Tower. Mr. Tower is not a party to the present petition. The appellees in the Supreme Court of Virginia were the Northern Virginia Transportation District Commission and the Board of Supervisors of Fairfax County, Virginia.

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DECISIONS BELOW

The decision of the Supreme Court of Virginia is reported as *Dykes v. Northern Virginia Transp. Dist. Comm.,* 242 Va. 357, and *Dykes v. No. Va. Dist. Com'n,* 411 S.E. 2d 1 (1991).

JURISDICTION

Pursuant to Rule 13.4 of the Court, the judgment sought to be reviewed was entered on January 10, 1992 at which time a Petition for Rehearing was denied by the Supreme Court of

Virginia which issued the judgment. This case involves a final judgment by a state supreme court which this Court has jurisdiction to review under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1.

STATEMENT OF THE CASE

On September 10, 1990, pursuant to state law, the Supreme Court of Virginia granted petitioner herein a writ of error from a judgment of the circuit court of Fairfax County holding that under decided Virginia law, respondents did not have to seek approval at a referendum, as required by the Constitution of Virginia, prior to incurring $330 million in bonded debt, to be paid from the general revenues of the county, for the purpose of completing a long-standing project known as the Fairfax County Parkway. By law, this appeal was put on that court's privileged docket and a hearing was set for Monday, January 7, 1991, but this hearing was canceled in the late afternoon of Friday, January 4, 1991, and was subsequently rescheduled for Wednesday, February 27, 1991. The hearing took place on that date before an en banc number of seven justices consisting of Chief Justice Carrico, Justices Stephenson, Russell, Whiting, and Lacy, and Senior Justice Harrison and Retired Justice Poff.

On April 19, 1991, the court handed down its decision reversing the decision of the trial court and entering final judgment invalidating the bond issue (Appendix A, pages 2a–11a). The majority opinion was written by Justice Whiting and was joined in by Justices Stephenson and Russell, Senior Justice Poff, and Retired Justice Harrison. Justice Lacy rejected and dissented from the majority opinion, but nominally concurred based on a violation of statute; an argument not made by either appellant in the record nor oral argument. Chief Justice Carrico dissented.

Appellees timely filed notice and petitions for rehearing, supported by four motions for leave to file briefs amicus curiae, and accompanying briefs. Rule 5:39 of the Supreme Court of Virginia does not allow a respondent to a petition for rehearing to file any paper or make any argument in opposition to a petition for rehearing prior to the court's action on the petition, this right not accruing until after a petition for rehearing is granted.

Virginia law, Code §8.01–675.2 provides, among other things, that a rehearing may be granted if one of the justices who ruled adversely to the petitioner certifies that in that justice's opinion there is good cause for a rehearing. On June 4, 1991, the petition for rehearing was granted pursuant to the *ex parte* proceeding under the court's rules. A brief in reply was filed by petitioner's counsel by the provided time on July 13, 1991, and the rehearing took place on September 16, 1991.

On September 11, 1991, counsel for petitioner learned for the first time, from the clerk of the Virginia Supreme Court by phone, that the hearing five days hence would not proceed as a rehearing as understood under Virginia law, and proclaimed by the published procedures and statements of the Virginia Supreme Court. Rather the entire case would be reheard *de novo,* again placing the burden of proof on the appellants who had been successful in the original hearing. Counsel also learned at this time that two justices, Russell and Harrison, who were part of the majority ruling for petitioner on April 19, 1991, would not

be present, and in their places would be two regularly sitting justices who had not heard the previous arguments.

Oral argument took place on September 16, 1991 with a court newly constituted with sitting Justice Compton in place of Senior Justice Harrison, and newly appointed Justice Keenan in place of Justice Russell; who retired on July 1, 1991, as he had announced almost a year earlier. On November 8, 1991, the court handed down a four to three decision against appellants (Appendix A, pages 11a–18a). All the remaining majority justices in the April 19, 1991 opinion, Whiting, Stephenson, and Poff, dissented. The majority opinion was written by Justice Lacy, who had technically concurred in the earlier opinion, and the opinion was joined in by Chief Justice Carrico, and Justices Compton and Keenan.

A petition for rehearing was timely filed by petitioner's co-appellant and this petition was denied on January 10, 1992. This petition for rehearing stated, at pages 4–5, that:

> The procedure this Court decided to follow on September 11, 1991 making the September 16, 1991 oral argument a *de novo* proceeding is in direct conflict with both generally established rehearing procedures and those of this Court, as these procedures existed up to five days before the September 16, 1991 oral argument. The radical and abrupt departure from these established procedures is a violation of due process under the Constitution of Virginia and a violation of Tower's rights, privileges, and immunities under the Fifth and Fourteenth Amendments to the Constitution of the United States.

These U.S. constitutional objections were also raised at page 15 of the petition for rehearing.

Subsequently, in preparation for this petition, counsel undertook to obtain a copy of the certification of respondents' petition for rehearing by a justice of the Virginia Supreme Court stating

that in that justice's opinion there was good cause for a rehearing, as required by Virginia Code §8.01-675.2 which empowers the Virginia Supreme Court to grant rehearing petitions. After much correspondence and evasion, the clerk of the Virginia Supreme Court informed counsel that there was nothing in writing, and no other information has been provided other than a general statement that an anonymous justice, at a conference, said that in that justice's opinion there was good cause for a rehearing. (Appendix E)

Counsel of record here for petitioner, on or about February 4, 1992, filed on behalf of both appellants before the lower court a motion to vacate the decision resulting from the rehearing due to noncompliance with statute. This motion stated at page 13 that:

> By the rehearing proceeding not complying with Virginia Code §8.01-675.2, this Court did not have jurisdiction to hear and decide the appellees' petitioned for rehearing, and such hearing and decision without jurisdiction violates Tower's constitutional rights under Virginia Constitution Article I, Section 11, and under the United States Constitution, Amendments Fourteen and Five, and Tower's rights under federal statutory civil rights law.

This motion was denied on April 3, 1992.

REASONS FOR GRANTING THE WRIT

I. THE ACT OF THE VIRGINIA SUPREME COURT OF CHANGING ITS LONG ESTABLISHED AND PUBLISHED POLICIES AND PROCEDURES FOR REHEARING FIVE DAYS BEFORE ORAL ARGUMENT, AFTER PETITIONER HAD RELIED UPON THE SUCH ESTABLISHED AND PUBLISHED POLICIES AND PROCEDURES CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. Applicable Decisions.

In the matter of *Evitts v. Lucey,* 469 US 387 (1985), this Court rejected the argument that there is no constitutional concern whether or not a state has an appellate process or how the process is operated if there is one, ruling instead that ". . . when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause. *Id.* at 401. This Court in *Daniels v. Williams,* 474 US 327 (1986), citing numerous past decisions on the question, observed that the Due Process Clause, like its forebearer in the Magna Carta, is intended to secure the individual from the arbitrary exercise of the powers of government. *Id.* at 331. In *United States v. Salerno,* 481 US 739, this Court stated that even when a government action survives a challenge of substantive due process scrutiny, what is done must still be implemented in a fair manner; this requirement has been traditionally referred to as "procedural" due process. *Id.* at 746. In *Zinermon v. Burch,* ___ US ___, 108 L Ed 2d 100 (1990), this Court said: "[T]o determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided and whether it was constitutionally adequate." *Id.* at 114. In *Lassiter v. Department of Social Services,* 452 US 18 (1981) this Court observed that "For all its consequences, 'due process' has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules,...due process is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* at 24. Further, "[a]pplying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Id.* (See also: *Connecticut v. Doehr,* ___ US ___, 115 L Ed 2d 1 [1991].)

B. Departure From Established Procedures.

Up until five days before argument on the rehearing in the case at bar, the Virginia courts followed the general rule found in almost every state that rehearing of a decided case was not a *de novo* reargument of that case, and that the issues in a rehearing are confined to instances where it is alleged that the decision was based on the wrong principle of law, as where the decision is in conflict with an express statute or a controlling decision to which the court's attention was not called, or where a higher appellate court has decided the precise question adversely after the decision, or where there has been a misconception by the court of proof in a material regard, or where the decision was based on a false record or was misconstrued by the appellate court, or where a mistake of fact in the opinion or judgment must be corrected. *See: Foreman v. U.S.* 361 US 416 (1900) fn. at 420; 5 Am Jur 2d, *Appeal and Error,* Sec. 988, 415. The dissent of Virginia Supreme Court Justice Whiting to the November 8, 1991 opinion reflects this policy: "A rehearing of this case has produced no arguments which were not – made and considered when a majority of this Court decided that the proposed bond issue was invalid." Appendix A, page 18a.

The Virginia Supreme Court's abrupt and last minute departure from established procedures on September 11 and 16, 1991 also violated specific statements, oral and written, by that court less than three months before. On June 18, 1991, in Richmond, Virginia, shortly before the deadline for petitioner filing her brief in reply to the petitions for rehearing, the Virginia Supreme Court conducted a continuing legal education (CLE) seminar and distributed a handbook. While a CLE seminar and handbook ordinarily have no value as precedent, this seminar and handbook are exceptions to the rule because the seminar and handbook were titled *Making an Appeal to the Supreme Court of Virginia – Taught by Virginia Supreme Court Justices and Other Experts,* and all then sitting justices participated in the seminar as lecturers. The pertinent area dealing with rehearing of a decision of that court was lectured by Virginia Supreme Court

Justice Hassell, who did not depart from the handbook outline which states, at page IV–23,

> Counsel should have a sound basis for requesting a rehearing. Simply desiring to halt the issuance of the mandate is not a sufficient reason. *Petitions should not challenge the legal principles adopted in the opinion unless controlling decisions have been rendered or statutes adopted subsequent to oral argument that affect the legal principles.* Petitions, however, appropriately should identify misstatements of fact, verifiable in the record, that affect the court's analysis. *A petition that reargues points made in the earlier briefs and rejected by the Court is not acceptable and will be viewed with disfavor.* (emphasis added)

This statement was brought to the attention of the Virginia Supreme Court in the petition for rehearing denied January 10, 1992.

In *Lassiter v. Department of Social Services, supra.,* this Court spoke of "fundamental fairness" and of what that concept consists in terms of relevant precedents and by assessing the several interests that are at stake. As to precedents, none has been found dealing specifically with such egregious judicial acts as we have here in the last–minute rewriting of rules and procedures which had been long established and relied upon by petitioner, but the interests involved are easily assessed.

The overwhelming interest is society's trust in the fairness of the judicial system and that a court treats all litigants before it equally. In the case at bar, the Virginia Supreme Court not only disregarded and/or abrogated its established procedures for rehearings, but did so a mere five days prior to oral argument by suddenly transforming a rehearing into a hearing *de novo,* then reversing its judgment not on the addition of new information, but solely by a switch of justices participating in the "rehearing." It is difficult, indeed impossible, to imagine a more flagrant and

suspect departure from "fundamental fairness" than what happened in this case.

Another aspect of the interests affected was cited by Virginia Supreme Court Justice Stephenson in his dissent where he pointed out that the Virginia legislature in 1990 had submitted to the voters of Virginia the question of whether the Virginia Constitution should be amended to allow schemes such as the Virginia Supreme Court in its November 8, 1991 decision found constitutional, and that this proposition had been "rejected overwhelmingly." (Appendix A, page 17a) That the legislature deemed it necessary to seek a constitutional amendment for such financing schemes evidences that the legislature did not hold that such authority was present in the Virginia Constitution or in any consistent legislation, and the voters responded in the negative to adding such authority.

While petitioner realizes that interpretations of the Virginia Constitution are the preserve of the Virginia Supreme Court, the interests of the judicial system and of the people's faith in its fairness required strict adherence to established procedure. Instead, the Virginia Supreme Court in an unprecedented act rewrote, or at least suspended for this case, its established procedures and also rearranged the justices (see, *infra.)* in order to reverse its previous opinion which was consistent with the view of the legislature and of the voters. In the public eye (contained in print and media commentaries not included here, but submitted to the Virginia Supreme Court in the request for rehearing which was denied) the actions of the Virginia Supreme Court are tantamount to what in the trial court context would be considered jury tampering or "rigging."

In short, these arbitrary actions of the Virginia Supreme Court strike at the heart of the public's faith in the integrity of the judicial system and are the sort of arbitrary exercise of the powers of government from which this Court in *Daniels v. Williams, supra.* ruled the individual is to be protected by the Due Process Clause.

C. Unnecessary Change in Make-Up of the Court.

Besides being suddenly and unexpectedly transformed into a *de novo* proceeding in violation of the established precedents and rules of the Virginia Supreme Court, two of the justices who had ruled in the majority for petitioner were not present at the September 16, 1991 rehearing, Justice Russell having retired on July 1, 1991, and Justice Harrison being absent for some unknown reason. Their places were taken by two justices who did not take part in the February 27, 1991 oral argument; one, Justice Compton was an already sitting justice, the other, Justice Keenan, a new Justice replacing Justice Russell. Both of these justices ruled against petitioner on November 8, 1991.

Even were retired Justice Russell and retired Justice Harrison physically unable to attend the rehearing, the proceeding could have gone forward with the remaining five justices who had heard the original arguments on February 27, 1991 for Virginia Code §17-93 allows as few as four justices to constitute a quorum for hearings.

There exists no consensus in either the federal or state decisions on the question of whether or not considerations of due process require that a rehearing be conducted by no other than the same judges or justices who heard the original arguments. Petitioner recognizes that there is a statistical possibility that situations could arise where events could make it impossible to compose a quorum on rehearing of the justices who participated in the original hearing. But this remote possibility should not deter this court from promulgating a rule that due process requires that where the regularly sitting judges or justices who participated in the original hearing constitute a quorum on the court considering the rehearing, only these judges or justices should take part in the rehearing. Petitioner also submits that where judges or justices who heard the original arguments are not sitting judges or justices on the court considering the rehearing, but whose presence would be necessary to constitute a quorum and they are not otherwise disqualified from participat-

ing in such rehearing, then for purposes of constituting a quorum such judges or justices should be part of the rehearing court.

II. THE FAILURE OF THE VIRGINIA SUPREME COURT TO PROVIDE A WRITTEN CERTIFICATION BY A JUSTICE OF THAT COURT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

A. Applicable Decisions.

To the due process decisions cited *supra.*, petitioner now adds this Court's decision in *Morrisette v. United States,* 342 US 246 (1952), that when a legislature

> . . . borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. *Id.* 263.

B. Failure of a Justice of the Supreme Court of Virginia to Provide the Written Certification Required by Law Violates Due Process.

Article VI, Sections 4 and 5 of the Constitution of Virginia respectively provide, in pertinent part, that the General Assembly of Virginia may adopt such additional measures as it deems desirable for the improvement of the judicial business, and that the Virginia Supreme Court may make rules governing the course of appeals and the practice and procedures used in the courts of Virginia, but such rules shall not be in conflict with the general law as the same shall, from time to time, be established by the General Assembly of Virginia.

The Virginia Supreme Court rule governing rehearings, Rule 5:39, is derived from Virginia Code §8.01-675.2, and the rule on its face provides that proceedings upon rehearing "*shall* be in accordance with Sec. §8.01-675.2 of the [Virginia] Code." This statute provides, in pertinent part, that

> The Supreme Court, on the petition of a party, shall rehear and review any case decided by such court if one of the justices who decides the case adversely to the petitioner *certifies that in [his/her] opinion* there is good cause for such rehearing. (emphasis added)

The order of the Virginia Supreme Court granting respondents a rehearing (Appendix B) contains no mention of an act of certification by a justice of that court. Subsequent inquiry by letter and telephone produced the admission by the clerk of the Virginia Supreme Court, on its behalf, that there was only an oral certification and that "the certification in this, as well as all other granted rehearing cases, is not in writing." (Appendix E)

The term "certify", in the general legal sense, carries the predominant meaning of a written document. More pertinent is the fact that this term, as used in another Virginia statute governing appellate procedure, leaves no question that a signed writing is meant by "certify". Virginia Code §8.01-683 states that the Clerk "shall certify and transmit" a decision of the Supreme Court of Virginia to the trial court where the case in point originated. Appendix F, a notification concerning awardable costs from the clerk of the Virginia Supreme Court, uses the word "certify" and is an example of that court's understanding of what the act of certification requires: namely, a signed writing.

The Virginia Supreme Court consistently follows and applies the maxim *noscitur a sociis,* which instructs that "the meaning of a word takes color and expression from the purport of the entire phrase of which it is a part, and it must be read in harmony with its context." (See: *Andrews v. American Health and Life Ins.,* 236 Va. 221, 225, 372 S.E. 2d 399, 401 [1988].) Accordingly,

Virginia Code §8.01-675.2 must be interpreted to require a signed writing, and the Virginia Supreme Court failed to comply with this statute. Virginia Code §8.01-675.2 is jurisdictional for a rehearing and the Virginia Supreme Court's failure to comply with this statute is a flagrant violation of procedural due process.

III. THE PROCEDURE OF THE SUPREME COURT OF VIRGINIA WHICH DENIES A LITIGANT THE OPPORTUNITY TO RESPOND TO A PETITION FOR REHEARING CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. Applicable Decisions.

The due process decisions cited *supra.* are applicable, with the case of *Zinermon v. Burch, supra.,* being particularly in point. In *Zinermon,* this Court repeated its holding in *Cleveland Board of Education v. Loudermill,* 470 US 532, 542, 84 L Ed 2d 494, 105 S Ct 1487 (1985) that " 'the root requirement' of Due Process Clause" is "that an individual be given an opportunity for a hearing *before* he is deprived of any protected interest;... "[a]t minimum, due process requires '*some* kind of notice and ...*some* kind of hearing'" *Zinermon, supra,* at 115.

B. The Virginia Supreme Court Unconstitutionally Denied Petitioner an Opportunity to Respond to the Petition for Rehearing Prior to Granting the Petition or Subsequently Under Its Rules.

Under the authority of Virginia Code §8.01-675.2, which governs rehearings by the Virginia Supreme Court, that court has adopted Rule 5:39(d) and (e) which state:

> (d) No petition for rehearing shall be allowed unless one of the justices who decided the case adversely to the applicant is of opinion that there is good cause for such rehearing. The proceedings upon such rehearing shall be in accordance

with §8.01-675.2 of the Code. No oral argument will be permitted on applications for rehearing.

(e) When a rehearing is granted, the case will be placed on the privileged docket for oral argument. The petitioner may not file any brief in addition to the petition for rehearing. The respondent may file in the office of the clerk of the Court 20 copies of the brief in reply to the petition and shall deliver or mail 3 copies to opposing counsel. Such brief in reply shall not exceed 15 typed or printed pages in length and shall be filed within 21 days after the date of the order granting the rehearing. The respondent will be heard orally whether or not he filed such brief. The case will be called at the next session of the Court after the expiration of the 21 days unless counsel agree that it be called at a session of the Court commencing at an earlier time.

These rules denied petitioner any opportunity to state her grounds against granting a rehearing prior to it being granted. Moreover, the Virginia Supreme Court's conversion of the rehearing into a *de novo* reargument of the entire case effectively denied petitioner a right to be heard on her arguments against granting the petition at any time, and the basic deprivation of due process by the court's rules was compounded by the court.

This Court's Rule 44.4 provides that a petition for rehearing will not be granted without the opportunity of a respondent to submit a response *before* the petition is granted. Petitioner submits that due process requires no less and that the procedure under the Rules of the Supreme Court of Virginia by denying petitioner this opportunity violates the Due Process Clause.

IV. ARBITRARY ACTION BY A STATE SUPREME COURT VIOLATES THE SUBSTANTIVE GUARANTEE OF LIBERTY PROTECTED BY THE 14TH AMENDMENT'S DUE PROCESS CLAUSE.

A. Applicable Decisions

In a long line of cases, this court has found substantive due process protection for certain liberty interests. See, e.g., *Moore v. East Cleveland,* 431 U.S. 494 (1977); *Roe v. Wade,* 410 U.S. 113 (1973); *Griswold v. Connecticut,* 381 U.S. 479 (1965). Thus, certain rights are deemed so fundamental, so important, that they receive substantive Constitutional protection from arbitrary government action. Indeed, a state must justify such action with a compelling interest.

All rights do not enjoy such heightened protection in the U.S. Constitution. But the *Constitution* is the *source* of rights that are "implicit in the concept of ordered liberty" and that are "rooted in the traditions of our nation." *Moore, supra; Roe, supra; Palko v. Connecticut,* 302 U.S. 319 (1937). The due process clause affords substantive protection to these cherished rights.

B. Substantive Due Process

The due process clause affords more than the procedural protection relied upon above. The 14th Amendment's due process clause protects substantive interests in life, liberty, and property. Thus, certain rights are so important that they are clothed with substantive Constitutional protection. The amount of protection due depends, of course, on the importance of the right or interest affected.

The right to orderly, fair, and honest government is implicit in the concept of ordered liberty. The right of citizen taxpayers to orderly and fair administration of justice is rooted in the traditions of our nation. Indeed, it is difficult to conceive a right more fundamental to other rights than this right to orderly, equitable administration of justice, for this right *secures* all others. This right is preservative of all other rights. As outlined in the facts and arguments above, however, the actions of the

Supreme Court of Virginia have evinced a total disregard for this cherished right.

The Virginia Supreme Court granted a rehearing without basis in new evidence, new arguments, or new legal principles. It did not follow the procedural rules for rehearing, but transformed the granted rehearing into a *de novo* proceeding. Through delay, the court changed its composition, and accordingly, changed its previous decision. It violated Virginia statutory law requiring a written statement by a justice that he or she is of the opinion that good reason exists for granting the rehearing.

These violations egregiously contravene perhaps the most important of all inalienable rights endowed to the individual in our society--the right of the individual to proper treatment by a fair and impartial government.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari to review the conduct of the rehearing of petitioner's case by the Supreme Court of Virginia.

Respectfully submitted,

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APPENDICES

APPENDIX A

MARCIA P. DYKES, ET AL.

v.

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.

Record No. 901033

OSGOOD TOWER

v.

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.

Record No. 901037

April 19, 1991

Present: Carrico, C.J., Stephenson, Russell, Whiting, and Lacy, JJ., Poff, Senior Justice, and Harrison, Retired Justice

MARCIA P. DYKES

v.

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.

Record No. 901033

OSGOOD TOWER

v.

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.

Record No. 901037

November 8, 1991

Present: Carrico, C.J., Compton, Stephenson, Whiting, Lacy, and Keenan, JJ., and Poff, Senior Justice

PRIOR OPINION

JUSTICE WHITING delivered the opinion of the Court.

This is a proceeding to validate a proposed bond issue to be repaid solely by funds appropriated by a county's board of supervisors, and which is not to be submitted to a vote of the people. The issue is whether the county will incur a long-term debt proscribed by Article VII, § 10(b) of the Constitution of Virginia (Article VII, § 10(b)).

In order to finance a part of the cost of completing the Fairfax County Parkway, the Fairfax County Board of Supervisors (the county) approved a proposed contract (the contract) with the Northern Virginia Transportation District Commission (the commission). The contract would obligate the commission to issue its "Transportation Contract Revenue Bonds" (the bonds) in an aggregate amount not to exceed $330,000,000. In return, the county would agree to fund the annual principal and interest payments and other listed expenses of the bond issue, to be disbursed by a trustee.[1] These funds would come from the county's "general revenues" and from "the Business, Professional and Occupational License Tax . . . or any other revenue appropriated . . . in substitution for or in addition thereto by" the county.

However, Section 4.05 of the contract would provide that

> [t]he obligation of the County to make any payments . . . is contingent upon the appropriation for each fiscal year by the Board of Supervisors of the County of funds from which such payments can be made. The County shall not be liable for any amounts that may be payable pursuant to this Contract unless and until such funds have been so appropriated for payment and then only to the extent thereof. It is understood and agreed by the parties hereto that nothing in this Contract shall be deemed to obligate the Board of Supervisors of the County to appropriate any sums on account of any payments to be made by the County hereunder. This Contract shall not constitute a pledge of the full faith and credit of Fairfax County or a bond or debt of Fairfax County in viola-

[1] Subject to a reserved right not to make the appropriations, the county also would pay the commission's listed expenses.

tion of Section 10 of Article VII of the Constitution of the Commonwealth.

As security for the payment of the bonds, the commission would transfer its interest in the contract by a proposed trust agreement (the trust agreement). The trust agreement, and the bonds themselves, would provide that "[t]he Bonds are limited obligations of the Commission payable solely from" the moneys provided to the Trustee by the County. The trust agreement further would provide that "[t]he obligation of the County . . . to make such payments . . . is subject to and contingent upon the annual appropriation by the County of moneys for such purpose."

On May 4, 1990, pursuant to the provisions of Code § 15.1-214, the commission and the county, as a "Plaintiff/Intervenor" (the plaintiffs), filed this bond validation proceeding against the "[t]axpayers, property owners and citizens" of Fairfax County and other localities serviced by the commission. Osgood Tower, Marcia P. Dykes, and "John Doe and Jane Doe numbers 1-25," Fairfax County citizens and taxpayers (the taxpayers), opposed the bond validation.

On July 12, after extended hearings and argument, the trial court validated the proposed bond issue. The taxpayers appeal.

[1] The taxpayers argue that because the indebtedness represented by the bond issue would extend for a period beyond the fiscal year of its proposed year of issue, it would be a long-term debt contracted by the county without voter approval. Therefore, the taxpayers contend that the bond issue would violate the following provision of Article VII, § 10(b):

> No [long-term] debt shall be contracted by or on behalf of any county . . . except by authority conferred by the General Assembly by general law. The General Assembly shall not authorize any such debt [except listed debts not relevant here] unless in the general law authorizing the same, provision be made for submission to the qualified voters of the county or district thereof or the region or district thereof, as the case may be, for approval or rejection by a majority vote of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt.

The plaintiffs respond that the financing plan would not violate Article VII, § 10(b) because they say that contracts subject to appropriation and bonds payable solely from payments pursuant to such contracts are not 'debts' as prohibited by the Virginia Constitution. Here, the plaintiffs seek to extend the scope of what is known as the "special fund" exception to constitutional limitations upon incurring long-term governmental debts without voter approval.

[2] In a case dealing with a long-term state debt and analogous constitutional limitation upon the state's power to incur such debts, we summarized the special fund exception by quoting from *Miller* v. *Watts*, 215 Va. 836, 841, 214 S.E.2d 165, 169 (1975):

> [N]o constitutionally prohibited indebtedness is created when bonds issued to finance a particular State capital project are to be paid solely from a *special fund derived from the revenues of that project; when the legislature is not obligated to appropriate funds for payment of the indebtedness*; and, when the indebtedness is not secured by the general faith, credit, and taxing power of the State.

Baliles v. *Mazur*, 224 Va. 462, 469-70, 297 S.E.2d 695, 699 (1982) (emphasis added).

[3] The plaintiffs rely upon three cases in which an analogous constitutional limitation was considered in connection with long-term indebtednesses proposed for the state's benefit. In those cases, we held that those indebtednesses would not be within the constitutional limitations because they were to be paid solely from special funds derived from the revenues of the financed projects. *Baliles*, 224 Va. at 466, 297 S.E.2d at 697 (rent for government's use of office and other buildings); *Harrison* v. *Day*, 202 Va. 967, 970, 121 S.E.2d 615, 617 (1961) (rent for use of port facilities); *Almond* v. *Gilmer*, 188 Va. 822, 840, 51 S.E.2d 272, 279 (1949) (toll fees and other charges earned by bridges and ferries). Here, there is no special fund because *no* income will be derived from the use of the Parkway; the *only* source of revenue for bond payments will be the county's annual appropriations from its occupational license receipts and other state revenues.

The plaintiffs contend that this would make no difference because we said in *Baliles* that "[t]he overriding consideration, therefore, is whether the legislative body is obligated to appropri-

ate the funds, not the source or composition of the special fund." 224 Va. at 471, 297 S.E.2d at 700. That statement, however, was made in response to a contention that the "special fund" doctrine could not be applicable in *Baliles* because the rent to be paid by the Commonwealth for its use of the buildings was a "fund consist[ing] entirely of money appropriated by the legislature." *Id.* As noted above, however, *Baliles* concerned a revenue-generating project and is therefore inapposite. Thus, this is the first case in which we have considered the implications of Article VII, § 10(b) in circumstances where the facility financed will not be a revenue-generating project.

[4] In *Terry* v. *Mazur*, 234 Va. 442, 362 S.E.2d 904 (1987), we considered a statutory scheme purporting to authorize the Commonwealth Transportation Board to issue revenue bonds to finance highway improvements. The bonds were to be secured by a "pledge" of future excise and other taxes, as well as fees relating to motor vehicles. The Attorney General contended that the bond issue met the requirements of the "special fund" doctrine, and was therefore constitutionally permissible without submission to a vote of the people. We disagreed, refusing to extend the "special fund" doctrine to projects other than those which generate their own revenues. *Id.* at 455, 362 S.E.2d at 911. We adhere to that view.

[5] The plaintiffs also contend that the bonds would not be a "debt" of the county because the bonds would be issued by the commission, not by the county. That, in our view, is a mere subterfuge. Because the trust agreement and the bonds themselves look to annual appropriations of the county's funds as the sole source for repayment of the bonds, it is of no consequence that bonds would be issued by the county's *alter ego*. "We must look to the purpose of the instruments, their substance and not their form. Merely giving to them a particular name or form [does] not take away the nature and effect of the transaction." *Bolling* v. *Hawthorne Coal Co.*, 197 Va. 554, 566, 90 S.E.2d 159, 168 (1955).

Although the contract permits the county to discontinue its promised appropriations, we must also consider the practical effect of such a calamitous event in deciding whether the county in fact would be bound to continue to service the bond issue and, therefore, has incurred a "debt" proscribed by Article VII, § 10(b). The county recognizes the importance of its fiscal integrity. It has been advised that the bond issue would not affect its triple A bond

rating. In fact, the contract would prohibit the county from changing its designation of the proceeds of its annual business, professional, and occupational tax as the primary source of appropriations for its annual bond payments without obtaining "confirmation from those rating agencies that shall have . . . rated and maintained ratings on the Bonds, that the then current ratings on the Bonds will not be reduced as a result of such change."

[6] The county also recognizes the disastrous effect that would follow any failure by the board of supervisors to make an annual appropriation and the county argues that such a disaster would never be permitted to occur. That argument implicitly acknowledges that the bond issue would have the practical effect of a long-term debt binding the county.

[7] The predecessor to Article VII, § 10(b) was adopted "[t]o safeguard the credit and *fiscal integrity* of the counties." II A. Howard, Commentaries on the Constitution of Virginia 863 (1974) (emphasis added). In explicating the predecessor to Article VII, § 10(b), we said that

> approval by a majority of the citizens voting on the question properly submitted to them, is a prerequisite to the power of the board of supervisors to create an obligation for any purpose, payable at some future time beyond the termination of the current fiscal year. In no other way, directly *or indirectly*, can the board bind the county on any such obligation.

American-LaFrance and Foamite Industries, Inc. v. *Arlington County*, 164 Va. 1, 9, 178 S.E. 783, 786 (1935) (emphasis added).

[8] The plaintiffs here impermissibly seek to accomplish indirectly what they cannot do directly. *See, e.g., Hart* v. *Commonwealth*, 221 Va. 283, 290, 269 S.E.2d 806, 811 (1981); *Foti* v. *Cook*, 220 Va. 800, 807, 263 S.E.2d 430, 434 (1980). It is obviously contemplated that the issuance of the bonds in accordance with the contract would bind future boards of supervisors to make annual appropriations of sufficient funds to finance the bonds. Manifestly, the animating purpose of the bond contract arrangement is to create a long-term debt, without submitting the debt to a vote of the qualified voters of Fairfax County.

[9] We hold, therefore, that the obligation thus incurred would be a "debt contracted by the county" in violation of Article VII, § 10(b) and, hence, that the bond issue would be invalid. Accord-

ingly, we will reverse the judgment of the trial court and enter final judgment invalidating the bond issue.

CHIEF JUSTICE CARRICO, dissenting.

I disagree with the majority. I have great difficulty, however, in stating the basis of my disagreement because I have even greater difficulty in discerning upon what basis the majority invalidates the bonds in question.

The majority concedes that "the contract permits the county to discontinue its promised appropriations." That should be the end of the case. Yet, continuing its search for a basis to invalidate the bonds, the majority says that the Court "must . . . consider *the practical effect* of [the county's discontinuance of its promised appropriations] in deciding whether the county in fact would be bound to continue to service the bond issue and, therefore, has incurred a 'debt' proscribed by Article VII, § 10(b)." (Emphasis added.)

The majority notes the county's recognition of "the importance of its fiscal integrity" as well as "the disastrous effect that would follow any failure by the board of supervisors to make an annual appropriation." then, opining that the county "impermissibly seek[s] to accomplish indirectly what [it] cannot do directly," the majority says it is obvious that "the issuance of the bonds in accordance with the contract would bind future boards of supervisors to make annual appropriations of sufficient funds to finance the bonds."

It might be obvious to the majority that the county would be bound to make annual appropriations of sufficient funds to finance the bonds, but it is not obvious to me. This is what the majority is saying: The practical effect of the county's exercise of its contractual right to discontinue the promised appropriations is to make it legally obligated to continue the promised appropriations.

I thought I knew what the term "practical effect" meant. I also thought I knew what the term "legally obligated" meant. And, to me, the two terms meant quite different things. Much to my surprise and dismay, however, the majority says the two terms mean the same thing, and I daresay the business and financial communities in this state will be equally surprised and dismayed at the majority's revelation.

It appears, therefore, that "practical effect' is the basis of the majority's invalidation of the bonds in question. If that is the basis, I consider it far too slender a reed to support such drastic action.

Rather, in my opinion, th bonds should be invalidated only if the county has undertaken an unconditional express obligation to continue making appropriations to pay the full amount of the bonds. I do not believe the county has undertaken such an obligation, and I would say this whether or not a special fund exists in this case.

The majority fails to even cite, let alone give effect to, important statutory provisions applicable to the transaction involved in this case. Code § 15.1-1358.2(a)(2) provides that "[t]he bonds and other obligations of a [transportation] district (and such bonds and obligations shall so state on their face) shall not be a debt of the Commonwealth or any political subdivision thereof and neither the Commonwealth nor any political subdivision thereof other than the district shall be liable thereon." furthermore, pursuant to Code § 15.1-1364(b), except for claims cognizable under the Virginia Tort Claims Act, "the obligations and any indebtedness of a [transportation district] commission shall not be . . . a debt or liability of the Commonwealth, or of any county or city . . . either legal, moral or otherwise."

Furthermore, the contract between the county and the commission provides that "nothing [therein] shall be deemed to obligate the Board of Supervisors of the County to appropriate any sums on account of any payments to be made by the County [thereunder]" and that the contract "shall not constitute a pledge of the full faith and credit of Fairfax County." And each bond proposed to be issued by the commission will bear the disclaim of the county's liability, as required by Code § 15.1-1358.2(a)(2).

I, too, think the Court should look to the "substance and not [the] form" of the pertinent documents in this case. *See Bolling* v. *Hawthorne Coal Co.*, 197 Va. 554, 566, 90 S.E.2d 159, 168 91955). But I think the Court must also look to the substance of applicable statutory provisions in determining the *real effect*, rather than the mere practical effect, of the documents in question. And, when I look at the case in this way, I do not see the evil the majority seems to find lurking behind every word the parties have used to express their undertaking.

Nor do I understand how, in the face of all the indicia of non-indebtedness present in the statute, the contract, and the bonds involved in this case, the majority can conclude that the county has incurred binding indebtedness in violation of Article VII, § 10(b). In reaching this conclusion, the majority has taken a mighty leap in logic to get whether it wants to go. This is too great a leap for me, and I dissent.

JUSTICE LACY, concurring.

This Court has come too far in its consideration of the constitutionality of financial obligations undertaken by state and local governments to declare today that an obligation is a debt for purposes of Article VII, § 10(b) of the Virginia Constitution when the obligation is only a conditional promise to pay, it is admitted by the parties to be only a moral obligation, and cannot be enforced through any legal process. This holding allows the "disastrous effect" of the failure to perform to create a *legal* obligation and directly contradicts the holdings and statements made by this Court in numerous prior cases, without any attempt to address, distinguish, or overrule them. *E.g., Terry* v. *Mazur*, 234 Va. 442, 451, 362 s.E.2d 904, 909 1987; *Baliles* v. *Mazur*, 224 Va. 462, 469, 297 s.E.2d 695, 698-99 1982; *Harrison* v. *Day*, 202 Va. 967, 975-77, 121 S.E.2d 615, 620-22 (1961); *Almond* v. *Gilmer*, 188 Va. 822, 840-41, 51 S.E.2d 272, 279 1949. This is the first instance in which the repayment of bonds is totally dependent on a conditional promise of the governmental unit. Although the "practical effect of such a calamitous event" on the governmental unit should it choose not to keep its promise to appropriate funds was no less present in these prior cases, it did not transform a conditional appropriation into a debt under Article VII, § 10(b). *Baliles* v. *Mazur, supra.*

I agree with the majority's analysis of the special fund doctrine as it applies to this case. I cannot accept the rationale by which the majority reverses the trial court's judgment. The county's promise to pay, which does not have to be kept, although the basis for the security underlying the bonds, nonetheless, does not legally obligate the county to appropriate sums for payment of a debt beyond one year and, therefore, does not run afoul of the constitu-

tional prohibition.* Nevertheless, I concur in the result the majority reaches because the contract between the county and the commission violates the Transportation District Act of 1964, Va. Code §§ 15.1-1342, *et seq.*

The Act was passed to allow the provision of transportation services and facilities on a regional basis. As reflected in the Act, effective planning and provision of a transportation infrastructure "cannot be achieved by the unilateral action of the counties." Code § 15.1-1343. The Act is not structured simply to provide a county with a financing mechanism for its own facilities, facilities in which the district commission has no interest whatsoever. In this regard, the district commission is similar to the Ports Authority and Public Building Authority. These entities were created to undertake certain types of projects which would provide directly, or through sale or lease, certain services and facilities.

Consistent with this purpose § 15.1-1359 allows the county to enter into contracts with the commission "pursuant to which . . . [the commission] . . . undertakes to provide the transportation facilities specified in a duly adopted transportation plan, and/or to render transportation service." Here, the commission is neither providing transportation facilities nor rendering transportation services to the county. It is only providing money to the county which in turn will construct the facilities, own them, and use them to provide transportation services. Code § 15.1-1359 does not authorize the county to enter into a contract with the commission where neither transportation service nor facilities are to be provided by the commission. Therefore, in my opinion, the contract at issue is invalid because it violates the Act.

I believe the contract also violates § 15.1-1364(b), which provides that the obligations and indebtedness of a commission "shall not create . . . any . . . obligation . . . of any . . . county . . . either legal, moral or otherwise . . . ." The majority, the appellants, the Attorney General, and even the appellees acknowledge the the contract imposes *some* type of obligation on the county. In fact, the Attorney General and the appellees have labeled the obligation a "moral" one. Furthermore, the contract obligates the county to hold the commission harmless from any liability or ex-

* Apparently, financial analysts and bond counsel consider the detriments of non-performance by the county to be so great that this promise, although not legally binding, provides sufficient security to potential bondholders to endorse the sale and purchase of the bonds.

pense "arising out of or in connection with this contract or the Bonds or the Trust Agreement."

Section 15.1-1364 is not a mere repetition by the General Assembly assuring that a commission obligation would not be "deemed to be" or interpreted as the legal obligation or a county or city subject to the constitutional limitation. *See e.g.*, § 15.1-1358.2(a)(2). Rather, this section prohibits creating such an obligation *in fact*, precisely to preclude the type of circumvention of statutory and constitutional provisions attempted here. The obligation of the commission to repay the $330,000,000 bonded indebtedness as reflected in the bond, trust, and contract documents creates and obligation, "moral or otherwise," on behalf of the county and, therefore, does not comply with the provisions of the Act.

Finally, the concluding proviso of § 15.1-1364(b) states that "nothing in this chapter . . . shall be construed to authorize a commission . . . to incur any indebtedness on behalf of or . . . obligate the . . . county . . . ." Thus, the General Assembly has stressed again that the commission's actions under the statute must comply with the law of the Commonwealth. The commission's obligations as reflected in the contract do not comport with this statutory provision. Therefore, both the county and the commission are precluded from executing the instant contract under the terms of the Act.

If the trial court's decree validating the bonds in issue is sustained, it is conclusive as to the validity of the "means provided for the payment of such bonds and the validity of all pledges of revenues and of all covenants . . . ." Code § 15.1-220. For the reasons set out above, I believe the contract offered as security for the bonds is invalid and, therefore, the judgment of the trial court must be reversed.

UPON REHEARING

MARCIA P. DYKES

v.

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.

Record No. 901033

OSGOOD TOWER

v.

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.

Record No. 901037

November 8, 1991

Present: Carrico, C.J., Compton, Stephenson, Whiting, Lacy, and Keenan, JJ., and Poff, Senior Justice

Appeals from judgments of the Circuit Court of Fairfax County. Hon. Thomas J. Middleton, judge presiding.

JUSTICE LACY delivered the opinion of the Court.

On May 3, 1990, the Northern Virginia Transportation District Commission (the Commission) adopted a resolution providing for the issuance of Northern Virginia Transportation District Commission Fairfax County Transportation Contract Revenue Bonds (bonds) in an amount not to exceed $330,000,000. The proceeds from the sale of the bonds are to be used by Fairfax County to complete the construction of the Fairfax County Parkway. On May 4, 1990, the Commission and Fairfax County, as a plaintiff intervenor, filed this bond validation proceeding pursuant to Code § 15.1-214 in the Circuit Court of Fairfax County. Osgood Tower, Marcia P. Dykes, along with other unnamed taxpayers and citizens of Fairfax County, opposed validation of the bonds.

On July 12, after extended hearings and argument, the trial court validated the proposed bond issue. Tower and Dykes appealed. We consolidated the appeals and on April 19, 1991, this Court determined that the trial court erred in validating the bonds. The County and the Commission filed motions for rehearing, which were granted on June 4, 1991.

Dykes and Tower argue that Art. VII, § 10(b) of the Virginia Constitution is applicable to the debt which will be incurred by issuing the bonds and, therefore, to be valid, the debt must either be approved by a vote of the people or qualify within the judicially-created "special fund" doctrine. They maintain that neither of these criteria is met in this instance and, therefore, the bonds are invalid.

[10] The threshold issue for consideration is whether Art. VII, § 10(b) is applicable to the debt in issue. That section states in pertinent part:

> No debt shall be contracted by or on behalf of any county or district thereof . . . except by authority conferred by the General Assembly by general law. The General Assembly shall not authorize any such debt . . . unless . . . provision be made for submission to the qualified voters of the county or district thereof . . . for approval or rejection by a majority vote of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt.

1. Commission Debt

[11] Dykes argues that this section is applicable to bonds issued by the Commission because the Commission is a "*district* 'created' by one or more cities and counties . . . proposing to issue bonds 'by or on behalf of' the County." This argument is unpersuasive. The use of the word "district" in the name of the Commission is insufficient to extend application of the section to it. Furthermore, the Constitution speaks in terms of a "district thereof." The Commission was authorized and created by statute, and is comprised of the Cities of Alexandria, Fairfax, and Falls Church, and the Counties of Arlington and Loudoun, in addition to Fairfax. Code § 15.1-342, *et seq.*; Acts 1964, c. 630. "It remain[ed] in a dormant state until brought into action by the local governing body." *Mumpower* v. *Housing Authority*, 176 Va. 426, 446, 11 S.E.2d 732, 739 (1940). The Commission clearly was not "created" by Fairfax County, and is not a "district thereof."

[12] The Commission is an independent political subdivision in the same manner as are housing authorities, water and sewer authorities, and industrial development authorities. The enabling legislation, like that of these other authorities vested with the power to incur bonded indebtedness, affirms that debt so incurred is that of the entity, not of the Commonwealth or of any other political subdivision. Code § 15.1-1358.2(a)(2). This statement is repeated in the bonds themselves, as well as in other documents constituting the financing proposal. We have repeatedly held that the debt incurred by legislatively created, independent political subdivisions, whatever their title, is not the debt of the Common-

wealth or of any other governmental unit, and we affirm that holding here. *Button* v. *Day*, 204 Va. 270, 272-74, 130 S.E.2d 459, 461-62 (1963); *Farquhar* v. *Board of Supervisors*, 196 Va. 54, 61, 82 S.E.2d 577, 582 (1954); *Mumpower*, 176 Va. at 451, 11 S.E.2d at 742. Therefore, the debt which will be incurred by the Commission in issuing the bonds is not subject to the provisions of Art. VII, § 10(b) of the Virginia Constitution.

2. County Debt

Dykes and Tower next argue that the financing proposal underlying the issuance of the bonds creates a debt incurred by the County which is subject to the constitutional limitation of Art. VII, § 10(b). The financing proposal consists of a contract between the County and the Commission which has been approved but not yet executed, and a proposed trust agreement providing for the transfer of the Commission's interest in the payments received from the County.

[13] The contract provides that the Commission will issue the bonds and that the County in turn will fund the annual principal and interest payments and other listed expenses of the bond issue. The repayment funds will come from the County's general revenues, including the Business, Professional, and Occupational License Tax "or any other revenue appropriated" by the County. Under the terms of the contract, however, the County's obligation to make the payments to the Commission "is subject to and contingent upon the annual appropriation by the County of moneys for such purpose."

[14] Neither Tower nor Dykes seriously argues that the terms of the financing documents impose a *legally* enforceable obligation on the County to appropriate the funds or to repay the bonds. Indeed, the contract, the trust agreement, and the bonds, § 4.05, § 7.01, and ¶ 3, respectively, each specifically states that the County is not obligated to appropriate funds or levy taxes for the payment of the bonds and that the financing proposals do not constitute a pledge of the full faith and credit of the County.

Rather, Dykes and Tower invite us to define "debt" as used in Art. VII, § 10(b) as something other than a legally enforceable obligation to pay. Dykes says constitutional debt exists because the financing proposal creates obligations which the "County cannot avoid." Tower argues that "subject to appropriation" financing constitutes a pledge of the County's full faith and credit,

thereby establishing constitutional debt. Both rely on factors such as the understandings and expectations of bondholders, county officials, and bond rating agencies as creating obligations on the County. While these indicia may be significant in other contexts, such as whether the financing scheme is good or wise policy, or in determination of the investment grade or credit worthiness of the bonds, here we are only concerned with the limited question whether these indicia, or any other, establish a "debt" of the County subject to Art. VII, § 10(b).

[15-16] We have described the attributes of "debt" for constitutional purposes in various ways. "[I]f the political entity is made generally liable, then an indebtedness is created within the debt limitations of the Constitution." *Terry* v. *Mazur*, 234 Va. 442, 450, 362 S.E.2d 904, 909 (1987) (quoting *Farquhar*, 196 Va. at 61, 82 S.E.2d at 582). Obligations which "are not secured by the general credit of the State or the issuing agency" do not constitute a debt within the constitutional limitation. *Button*, 204 Va. at 272, 130 S.E.2d at 461. And we have held that, for purposes of Art. X, § 9,

> we have one criterion for determining the existence of unconstitutional debt: Is the full faith and credit of the Commonwealth pledged or committed? If not, no unconstitutional debt is created.

Baliles v. *Mazur*, 224 Va. 462, 471, 297 S.E.2d 695, 699 (1982).

[17] We have specifically rejected the proposition that "subject to appropriation" financing in which the legislative body is not legally obligated to make the appropriation creates state debt for constitutional purposes, *Almond* v. *Gilmer*, 188 Va. 822, 842-43, 51 S.E.2d 272, 280 (1949), and have reaffirmed that holding:

> [T]here was no constitutionally prohibited debt even though the "expectation" of these continued appropriations was an essential ingredient in the negotiations . . . . This did not in any way contractually obligate the state to make these appropriations.

Baliles, 224 Va. at 469, 297 S.E.2d at 698-99 (referencing *Harrison* v. *Day*, 202 Va. 967, 121 S.E.2d 615 (1961)).

These cases, whether involving debt incurred by the state or by a county, share a single rationale. No debt is created for constitu-

tional purposes if the state or county "incurred no legal liability to underwrite the project." *Miller, Att. Gen.* v. *Watts, Treas.*, 215 Va. 836, 845, 214 S.E.2d 165, 171 (1975). The debt created must involve a "binding and direct commitment," *id.* at 845, 214 S.E.2d at 172, a commitment which can be enforced against the maker. There must be a *legal* obligation.

"Subject to appropriation" financing does not create constitutionally cognizable debt because it does not impose any enforceable duty or liability on the County. Expectations of bondholders, County officials, or bond rating agencies do not create County "debt" any more than the expectations of the railway for continued appropriations by the state created state debt in *Harrison* v. *Day*, *supra*.

[18] Under the financing proposal at issue, neither the County nor its general revenues is liable for repayment of the debt incurred by the bond issue. In the absence of a legal obligation, the County has not incurred a debt cognizable under Art. VII, § 10(b).

In summary, we hold that Art. VII, § 10(b) is not applicable here because no constitutional debt was incurred by the County, and the debt of the Commission is not subject to that constitutional provision. In light of this holding, it is unnecessary to consider application of the special fund doctrine. We have also considered Dykes's other arguments and find them without merit.* Accordingly, we will affirm the judgment of the trial court.

Record Nos. 901033 and 901037 - *Affirmed.*

JUSTICE STEPHENSON, with whom JUSTICE WHITING and SENIOR JUSTICE POFF join, dissenting.

I join Justice Whiting's dissent. I write separately, however, to express additional reasons to support my position.

Never before has this Court validated a bond issue like the one in question. I find the scheme employed by the County to be a shocking, patent attempt to circumvent and nullify the requirement of voter approval contained in § 10(b).

By the proposed contract with the Commission, the County would agree to make annual payments sufficient to pay the debt

* Tower waived all other assignments of error at oral argument on rehearing.

service on the bonds. The funds for these payments are derived solely from, and are contingent upon, annual appropriations from the County's general revenues.

The County contends, and the majority holds, that "no constitutional debt was incurred by the County" because the payments are contingent upon the annual appropriations. Although the County states that the bondholders can expect it to make continuous, annual appropriations, it relies upon its right and power not to do so, i.e., to default without fault, as making the scheme constitutional. We should not validate such a scheme.

More importantly, no government should employ such a scheme. Indeed, "government is, or ought to be, instituted for the common benefit, protection, and security of the people," Va. Const. art. I, § 3, and the preservation of a free government requires "a firm adherence to justice, moderation, temperance, frugality, and virtue," Va. Const. art. I, § 15. These quotations are not merely abstract terms; they are found in the Bill of Rights and have been part of our basic law since the Commonwealth was established.

Is anyone so naive that they truly believe that the County, in reality, is not compelled to make annual appropriations until the bonds are retired? What are some of the consequences if the County ceases to make the appropriations? Obviously, the bondholders would have no recourse, and their bonds would be worthless. Quite obviously, also, the County's credit would be seriously impaired, if not destroyed.

The § 10(b) requirement of voter approval of long-term county debt has existed for more than six decades. The requirement was not deleted when our Constitution was revised in 1971.

More recently, the General Assembly proposed an amendment to § 10 that would have allowed counties to issue bonds, without voter approval, "for transportation purposes, the principal and interest on which [would have been] payable exclusively from the pledge of the revenues and receipts of any local taxes . . . ." Acts 1989, c. 670; Acts 1990, cc. 736, 881. On November 6, 1990, however, this proposal was rejected overwhelmingly by the Commonwealth's voters.

Today, the majority, in effect, has sanctioned what the voters rejected. Consequently, by employing the approved scheme, counties now are at liberty to create bond indebtedness, payable from their general revenues, without submitting the matter to their vot-

ers. For all practical purposes, the § 10(b) debt proscription has been nullified by judicial fiat.

JUSTICE WHITING, with whom JUSTICE STEPHENSON and SENIOR JUSTICE POFF join, dissenting.

A rehearing of this case has produced no arguments which were not made and considered when a majority of this Court decided that the proposed bond issue was invalid.[1] No matter how the new majority phrases it, the present decision is simply an approval of an end run around the constitutional requirement of voter approval before a county can be saddled with long-term indebtedness. Accordingly, for the reasons expressed in the former majority opinion and in the dissent now filed by Justice Stephenson, I dissent.

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[1] Amicus Curiae have filed briefs on rehearing asking, *inter alia*, that the original decision be made prospective only. I would have had no objection to such an application of the original opinion. *See e.g. Harper* v. *Virginia Department of Taxation*, 242 Va. 322, ___ S.E.2d ___ (1991); *Harper* v. *Virginia Department of Taxation*, 241 Va. 232, 240, 241-42, 401 S.E.2d 868, 873-74 (1991); *Perkins* v. *Albemarle County*, 214 Va. 416, 418, 200 S.E.2d 566, 568 (1973).

APPENDIX B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday to 4th day of June, 1991.

Marcia P. Dykes, *Appellant,*

against Record No. 901033
Circuit Court No. L-97040

Northern Virginia Transportation
District Commission, et al., *Appellees,*

Osgood Tower, *Appellant,*

against Record No. 901037
Circuit Court No. L-97040

Northern Virginia Transportation
District Commission, et al., *Appellees,*

Upon Petitions for Rehearing

On consideration of the petitions of the appellees to set aside the judgments rendered herein on the 19th day of April, 1991

and grant a rehearing thereof, it is ordered that the said judgments be set aside, the opinion rendered April 19, 1991 be withdrawn and a rehearing is granted.

A Copy,

Teste:

Clerk

APPENDIX C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 10th day of January, 1992.

Marcia P. Dykes, *Appellant,*

against Record No. 901033
Circuit Court No. L-97040

Northern Virginia Transportation
District Commission, et al., *Appellees,*

Osgood Tower, *Appellant,*

against Record No. 901037
Circuit Court No. L-97040

Northern Virginia Transportation
District Commission, et al., *Appellees,*

Upon Petitions for Rehearing

On consideration of the petition of appellant Marcia P. Dykes to set aside the judgment rendered herein on the 8th day of

November, 1991 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Davis B. Beach
Clerk

APPENDIX D

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 3rd day of April, 1992.

Marcia P. Dykes, *Appellant,*

against Record No. 901033
Circuit Court No. L-97040

Northern Virginia Transportation
District Commission, et al., *Appellees,*

Osgood Tower, *Appellant,*

against Record No. 901037
Circuit Court No. L-97040

Northern Virginia Transportation
District Commission, et al.,

From the Circuit Court of Fairfax County

On February 5, 1991 came the appellants, by counsel, and filed motions to vacate this Court's decision of November 8, 1991 in these cases.

Thereupon came the appellees, by counsel, and filed letter responses.

On consideration whereof, the appellants' motions are denied.

A Copy,

Teste:

Clerk

APPENDIX E

SUPREME COURT OF VIRGINIA
Supreme Court Building
Richmond, Virginia 23219
804-786-2251

January 21, 1992

Neil F. Markva, Esq.
Attorney at Law
Springfield Professional Park
8322-A Traford Lane
Springfield, Va 22152

Dear Mr. Markva:

On January 17, 1992, the Court directed me to respond to your letter of January 16, in this manner: In my letter to you dated January 2, 1992, I advised you that in a court conference one of the justices who voted adversely to the petitioner certified there was good cause to grant a rehearing and that the Court was of opinion this procedure complied with the provisions of Code § 8.01-675.2. In my letter to you dated January 9, 1992, I advised you that the Court is not subject to the provisions of the Virginia Freedom of Information Act. The Court reiterates both these positions but has authorized me to tell you that because it does consider the procedure outlined in my January 2 letter to be in compliance with Code § 8.01-675.2, the certification in this, as well as all other granted rehearing cases, is not in writing.

Sincerely yours,
David B. Beach
Clerk

DBB:dhp

APPENDIX F

SUPREME COURT OF VIRGINIA

Osgood Tower, *Appellant,*

against Record No. 901037
Circuit Court No. L-97040

Northern Virginia Transportation
District Commission, et al., *Appellees.*

ITEMIZED STATEMENT OF COSTS

I, David B. Beach, Clerk of the Supreme Court of Virginia, do hereby certify that the appellees shall recover from the appellant costs in this case as follows:

Costs of appellee Northern Virginia Transportation District Commission:

Printing petition for rehearing	$ 58.50
Attorney's fee	25.00

Costs of appellee Board of Supervisors of Fairfax County:

Printing brief	100.00
Printing petition for rehearing	176.58
Printing supplement to appendix	134.80

Attorney's fee 25.00

Given under my hand this 6th day of April, 1992

Clerk

Supreme Court, U.S.
FILED
MAY 5 1992
OFFICE OF THE CLERK

(2) (2)

91-1580 & 91-1664

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

OSGOOD TOWER and MARCIA P. DYKES,
Petitioners,

v.

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION OF RESPONDENT NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION

William G. Broaddus*
William J. Strickland
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One James Center
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Counsel for Respondent
Northern Virginia Transportation
District Commission
**Counsel of Record*

QUESTIONS PRESENTED

1. Whether a state supreme court's construction of the debt provisions of its constitution raise federal questions permitting review by this Court.

2. Whether rules of a state supreme court pertaining to its process for considering a case upon rehearing raise federal questions or otherwise warrant this Court's review under Rule 10, Rules of the Supreme Court of the United States.

PARTIES

The Northern Virginia Transportation District Commission was the plaintiff in the trial court and appellee in the Supreme Court of Virginia.

The Board of Supervisors of Fairfax County was an intervenor-plaintiff aligned with the Commission in the trial court and an appellee in the Supreme Court of Virginia.

Marcia P. Dykes and Osgood Tower were defendants in the trial court and appellants in the Supreme Court of Virginia.

Dykes and Tower have filed separate petitions for writs of certiorari in this Court.

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91-1580 & 91-1664

October Term, 1991

OSGOOD TOWER and MARCIA P. DYKES,
Petitioners,

v.

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION OF RESPONDENT NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION

DECISION BELOW

The decision of the Supreme Court of Virginia is reported as Dykes v. Northern Virginia Transportation District Commission, 242 Va. 357, 411 S.E. 2d 1 (1991).

JURISDICTION

The Northern Virginia Transportation District Commission and the Board of Supervisors of Fairfax County initiated this case to determine whether a proposed bond issue met certain requirements of the

Constitution of Virginia. The trial court granted relief to the Commission and to the Board and validated the bonds. Dykes and Tower, defendants at trial, appealed to the Supreme Court of Virginia which granted writs to review the trial court's decision.

In a decision dated April 19, 1991, the Supreme Court, by a 5-1 majority with one Justice concurring in the result, reversed the decision of the trial court.

In June, 1991, the Supreme Court granted petitions for rehearing and withdrew its April opinion and judgment. The Court heard new argument in September, 1991. On November 8, 1991, the Supreme Court handed down a new decision in which the Court, by a 4-3 majority, affirmed the judgment of the trial court below validating the bonds as constitutional under the Virginia Constitution.

On January 10, 1992, the Supreme Court denied Dykes and Tower's petitions for rehearing. On April 3, 1992, the Supreme Court denied Dykes and Tower's motions to vacate the Court's November 8, 1991 decision.

PROVISIONS OF LAW

Constitution of Virginia: Art. VII § 10(b)

> No debt shall be contracted by or on behalf of any county or district thereof or by or on behalf of any regional government or district thereof except by authority conferred by the General Assembly by general law. The General Assembly shall not authorize any such debt except the classes described in paragraphs (1) and (3) of subsection (a), refunding bonds, and bonds issued, with the consent of the school board and the governing

> body of the country, by or on behalf of a county or district thereof for capital projects for school purposes and sold to the Literary Fund, the Virginia Supplemental Retirement System, or other State agency prescribed by law, unless in the general law authorizing the same, provision be made for submission to the qualified voters of the country or district thereof or the region or district thereof, as the case may be, for approval or rejection by a majority vote of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt.

Statute: Sec. 8.01-675.2 of the Code of Virginia (in pertinent part):

> The Supreme Court, on the petition of a party, shall rehear and review any case decided by such court if one of the justices who decides the case adversely to the petitioner certifies that in his opinion there is good cause for such rehearing.

Rule: Rule 5:39, Rules of the Supreme Court of Virginia (in pertinent part):

> (d) No petition for rehearing shall be allowed unless one of the justices who decided the case adversely to the applicant is of opinion that there is good cause for such rehearing. The proceedings upon such rehearing shall be in accordance with § 8.01-675.2 of the Code. No oral argument will be permitted on applications for rehearing.

(e) When a rehearing is granted, the case will be placed on the privileged docket for oral argument. The petitioner may not file any brief in addition to the petition for rehearing. The respondent may file in the office of the clerk of this Court 20 copies of the brief in reply to the petition and shall deliver or mail 3 copies to opposing counsel. Such brief in reply shall not exceed 15 typed or printed copies in length and shall be filed within 21 days after the date of the order granting the rehearing. The respondent will be heard orally whether or not he filed such brief. The case will be called at the next session of the Court after the expiration of the 21 days unless counsel agree that it be called at a session of the Court commencing at an earlier time.

STATEMENT OF THE CASE

This case arises out of the efforts of two citizens to block a proposed bond issue as allegedly invalid under the Virginia Constitution because the Board did not first submit the proposal to the voters in a referendum.

After the trial court validated the proposed bonds under the Virginia Constitution, the two citizens appealed to the Supreme Court of Virginia. Initially, the Supreme Court reversed the trial court.

Because of the far reaching implications of the majority opinion, the Commission and the Board, with the support of numerous amici, petitioned for rehearing. By Order dated June 4, 1991, the Supreme Court ordered that its April judgments "be set aside, the opinion rendered April 19, 1991, be withdrawn and a rehearing granted." See Dyke's Appendix B, p. 19a-20a. The

Court's decision to grant rehearing was made at a conference of the Justices where a Justice orally "certified" that rehearing should be granted. According to the Clerk of the Court, writing on behalf of the Court, this procedure complies with the Virginia requirements. See Dyke's Appendix E, p. 25a.

In September, the Court heard new argument and, by decision dated November 8, 1991, affirmed the trial court and validated the bonds under Virginia law. Thereafter, the Court denied motions to set aside the November opinion.

At the first hearing resulting in the April decision, the sitting Justices of the Supreme Court participated with the exception of Justice Hassell, who had been a partner in one of the firms appearing before the Court, and Justice Compton, who was ill. A Senior Justice and a retired Justice sat in their places. On rehearing in September, the same Senior Justice continued to sit in place of Justice Hassell, but Justice Compton resumed his seat as a regular, sitting Justice. Justice Keenan replaced Justice Russell who had retired during the interim.

SUMMARY OF ARGUMENT

Petitioners seek this Court's review of the Virginia Court's determination that a proposed bond issue does not constitute debt as defined in the Virginia Constitution. Because the ultimate decision was made on rehearing, petitioners also seek this Court's review of the internal procedures followed by the Supreme Court of Virginia pertaining to rehearings in that Court.

These state questions do not satisfy the federal jurisdictional requirements for considering petitions and they fall woefully short of meeting the requirements of

Rule 10, Rules of the Supreme Court of the United States. The petitions should be denied.

ARGUMENT

-1-

THE QUESTION WHETHER THE PROPOSED BONDS ARE VALID CONCERNS ONLY STATE LAW AND DOES NOT CONSTITUTE A FEDERAL QUESTION

Petitioner Tower asks this Court to review the opinion of the Supreme Court of Virginia on the question of whether a proposed Fairfax County bond issue constituted "debt" as that term is used in Art. VII, § 10(b) of the Constitution of Virginia.[1] That question concerns only state law.

Whether phrased in terms of Title 28 § 1257; Rule 10, Rules of the Supreme Court of the United States; comity; federalism; or independent state grounds, there is no basis for this Court to review the decision of the Supreme Court of Virginia which pertained solely to state law. Accordingly, respondent submits that this Court is without jurisdiction or constitutional authority to review this issue. Murdock v. City of Memphis, 87 U.S. (20 Wall) 590 (1873).

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[1]It is not surprising that Tower concentrates on this issue. At argument on rehearing before the Supreme Court of Virginia, Tower, then represented by Mr. Goldbecker who now serves as counsel to Marcia Dykes, waived all other assignments of error. See Dykes' appendix 16a.

THE QUESTIONS PERTAINING TO THE VIRGINIA COURT'S REHEARING PROCESS DO NOT WARRANT REVIEW UNDER RULE 10

Petitioner Dykes argues that certain internal procedures of the Supreme Court of Virginia pertaining to its rehearing process violate due process. These procedures include: (1) treating the case de novo on rehearing; (2) granting a rehearing for reasons Dykes deems unacceptable; (3) permitting regularly sitting Justices who did not initially sit to sit on rehearing; (4) failure of the Justice voting to grant rehearing to so "certify" in writing; and (5) inability under the Virginia Rules to be able to file a brief in opposition before the Supreme Court acts on the petition for rehearing.

Reasons (1) through (4) concern only state questions and do not raise due process considerations.

1. When a court withdraws its opinion and sets aside its judgment and grants a rehearing, it follows that the rehearing will be de novo. Even if the petitioners here initially misunderstood the process, because the question before the Virginia court was solely a question of law, the only effect was which side would first present oral argument on rehearing. There was no prejudice. In fact, they retained the strategic advantage of rebuttal argument.

2. The Virginia Court is not required to articulate reasons for granting a writ or a rehearing. Even accepting as true that the reasons were not of the type for typically granting rehearing as described by a Justice in a continuing legal

education program, that does not constitute a due process violation warranting review by this Court. It was a matter solely within the discretion of the Supreme Court of Virginia.

3. The method used by a state court to determine whether regular sitting justices will sit in any particular case does not create a federal question.

4. The determination by a state supreme court that its action complies with the procedural requirement of a state statute does not create a federal question, particularly when the state question is whether an oral statement satisfies a statutory reference to "certify."

Reason (5), while described in the context of due process, does not give rise to a legitimate federal question because Dykes was given the opportunity to brief the case prior to the second argument and to participate in that argument.[2] The fundamental requirement of due process is the right to be heard at a meaningful time and in a meaningful manner. Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Dykes' opportunity to present her case, both by brief and argument of counsel, before the dispositive November 8, 1991 opinion was rendered fulfills all due process requirements.

---

[2]In fact, petitioners took advantage of three opportunities to brief and orally argue the case in the Supreme Court of Virginia -- first at the petition stage, second at the initial argument before the full court, and third at the rehearing argument.

CONCLUSION

For the foregoing reasons, the Northern Virginia Transportation District Commission requests that this Court deny the petitions.

Respectfully submitted,
Northern Virginia Transportation District Commission

By: William G. Broaddus
William G. Broaddus
Counsel for Respondent
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CERTIFICATE

I hereby certify that this 5th day of May, 1992, we filed forty copies of this Brief of the Respondent Northern Virginia Transportation District Commission in the Clerk's Office and mailed three copies of it to Frederick H. Goldbecker, Esquire, P. O. Box 517, Fairfax, Virginia 22030, counsel for Marcia P. Dykes; Osgood Tower, pro se, 4200 Pineridge Drive, Annandale, Virginia 22003; and Robert Lyndon Howell, Esquire, Acting County Attorney, 4100 Chain Bridge Road, Fairfax, Virginia 22030, counsel for Board of Supervisors of Fairfax County, Virginia.

William G. Broaddus

(3)

Supreme Court, U.S.
FILED
MAY 13 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

Marcia P. Dykes,

Petitioner,

v.

Northern Virginia Transportation District Commission, et al.

Respondents.

No. 91-1664

REPLY BRIEF

ADDRESSED TO ARGUMENTS FIRST

RAISED IN RESPONDENT'S BRIEF IN OPPOSITION

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(703) 644-5000
Attorneys for Petitioner

SCOPE OF REPLY TO NEW ARGUMENTS FIRST RAISED BY RESPONDENT IN ITS BRIEF IN OPPOSITION

The new arguments respondent Northern Virginia Transportation District Commission first raises in its brief in opposition go to the question of whether this Court has jurisdiction of the questions posed in petitioner's petition filed April 9, 1992, to review the procedural actions of the Virginia Supreme Court petitioner complains of for violations of the Due Process Clause pursuant to 28 USC 1257(a).

PARTIES

The appellants in the Supreme Court of Virginia were Marcia P. Dykes (the petitioner here) and Osgood Tower. Mr. Tower is not a party to the present petition having filed his own separate petition in an independent proceeding before this Court. The appellees in the Supreme Court of Virginia were the Northern Virginia Transportation District Commission and the Board of Supervisors of Fairfax County, Virginia.

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4. Respondent, without support of any authority, is asking this Court to divest itself of jurisdiction for review of state court adherence to the federal Due Process Clause required by 28 USC 1257(a) and Amendment XIV to the Constitution of the United States.	8

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5. Respondent's argument that petitioner had the opportunity to brief her case prior to oral argument at the rehearing is untrue. 9

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In The

Supreme Court of the United States

October Term, 1991

Marcia P. Dykes,

Petitioner,

v.

Northern Virginia Transportation District Commission, et al

Respondents.

No. 91-1664

PETITIONER'S REPLY TO RESPONDENT'S ARGUMENTS FIRST RAISED IN ITS BRIEF IN OPPOSITION

The petitioner, Marcia P. Dykes, pursuant to Rule 15:6 now files this reply brief to the brief in opposition to her petition for writ of certiorari (petition) filed by the respondent Northern Virginia Transportation District Commission on or about May 5, 1992. Petitioner's reply is directed to the following arguments first raised by respondent in its brief in opposition.

1. **Respondent's new and unsupported argument that a rehearing is necessarily a *de novo* proceeding is contrary to established Virginia law and procedure.**

As petitioner has previously cited in her petition, this Court has held, with regard to state appellate practices, that when a state opts to act in a field where its action has significant discretionary elements, it must act in accord with the dictates of the Constitution of the United States, in particular in accord with the Due Process Clause, which, like its forbearer the Magna Carta, is intended to secure the individual from the arbitrary exercise of the powers of government. *Evitts v. Lucy*, 469 US 387 (1985); *Daniels v. Williams*, 474 US 327 (1986); petition at 6.

This Court has just recently made the unambiguous ruling that it recognizes the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them. *Coleman v. Thompson*, 111 S.Ct 2546, 2565 (1991). This Court has recognized that each State's complement of procedural rules is to channel, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently. *Reed v. Ross*, 468 U.S. 1, 10, 104 S.Ct. 2901, 2907, 82 L.Ed.2d 1 (1984).

Because this Court has ruled, and correctly so we submit, that federal disruption or overturning of established state court procedures is damaging to the system of justice within those States, then the arbitrary disruption and overturning of established state court procedures and mandatory statutes governing such procedures *by the state court itself*, as was done by the Virginia Supreme Court by its wholesale departure from established rehearing procedure, and by its refusing to comply with the statutory mandate of Virginia Code 8.01-675.2, must be viewed with even greater censure by this Court. Not only does the action of the Virginia Supreme Court violate the basic concepts of decency and fairness which have been said to be among the fundamental principles of liberty and justice lying at the base of our civil and political institutions (Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, 7 Utah L.Rev. 423, 442 [1961]), but it violates as well the concept of

fair and efficient disposition of questions this Court spoke of in *Reed, supra*.

At page 7 of the brief in opposition, in the paragraph numbered 1, respondent argues that when a court withdraws its opinion, sets aside its judgment, and grants a rehearing, "it follows that the rehearing will be *de novo*." No supporting authority for this broad claim is given, no doubt for the simple reason that Virginia authority not only does not support this claim, but contradicts it, thereby evidencing denial of due process for petitioner.

Virginia Supreme Court Justice Whiting (who wrote the original majority opinion of April 19, 1991) candidly stated in his dissent to the November 8, 1991 opinion – and was joined by Justice Stephenson, and Senior Justice Poff – that "a rehearing of this case has produced no arguments which were not made and considered [at the original hearing]." (Petition Appendix A, at 1a.) This statement by Virginia Supreme Court Justice Whiting, like the seminar statement of Virginia Supreme Court Justice Hassell and the accompanying printed handbook approved by the Virginia Supreme Court (Petition at 7–8) summarize the law concerning rehearings as that law existed until September 11, 1991.

As the following briefly quoted cases demonstrate, the decided case law in Virginia consistently states that a rehearing (1) focuses on an error on the face of the record, some legal excuse for failure to present a full defense, or the discovery of new and important evidence or testimony not known or accessible to the petitioner before the former hearing, and (2) places the burden of proof on the party seeking rehearing.

> In order to demonstrate an entitlement to a rehearing, a petitioner must show either an "error on the face of the record, or ... some legal excuse for his failure to present his full defense at or before the time of entry of the decree. *Holmes v.*

Holmes, 7 Va. App 472, 480, 375 S.E.2d 387, 392 (1988)

> The petitioner's right to relief on such rehearing *depends upon his ability to point out* some error on the face of the record, or to show some legal excuse for his failure to present his full defense at or before the time of entry of the decree which he seeks to have modified. (Emphasis added) *Downing v. Huston, etc. Co.*, 149 Va. 1, 9, 141 S.E. 134, 137 (1927). Cited in *Holmes, supra*.

> As the petition to rehear did not allege the discovery of new and important testimony not known or accessible to the petitioner before the former hearing and pointed out no error upon the face of the former decree, it was properly dismissed. *Woods v. Early*, 95 Va. 311, 28 S.E. 375. Cited in *Downing, supra*.

> Courts are provided for the purpose of putting an end, and a speedy end, to controversies, not as a forum for endless litigation. Without valid excuse, no party who has had his day in court can reopen the hearing after final decision of extrinsic matters in controversy between the same parties on the mere ground that he wishes to interpose other defenses which he neglected to interpose before such decision was made. *Gills v. Gills*, 126 Va. 526, 101 S.E. 900. Cited in *Downing, supra*.

Under Virginia law, the appellate power of the Virginia Supreme Court is purely statutory. *Bedinger v. Com.*, 7 Va. (3 Call) 461; *Clark v. Conn*, 15 Va. (1 Munf.) 160. Virginia Code 8.01-675.2 makes no provision that a rehearing be *de novo*, nor can this power be implied since the Virginia statute governing

appeals within the state system, from the Virginia general district courts to the Virginia circuit courts, Virginia Code 16.1-136, specifically provides that the appeal taken "shall be heard *de novo* in the appellate court."

Applying the familiar maxims of *inclusio unius es exclusio alterius* and *noscitur a sociis* to construction of the legislative scheme governing all Virginia courts requires the conclusion that rehearings at any level of the Virginia court system are not to be trials *de novo* since the legislature has used this term in certain instances, but has declined to do so with regard to rehearings.

It is well settled law in Virginia that the legislature acts with full knowledge of the law as it stood bearing on the subject with which it proposed to deal. *Cape Henry v. Natl. Gypsum*, 229 Va. 596, 600-601, 331 S.E. 2d 476, 479 (1985). The basic decisions cited above regarding the focus and burden of the rehearing procedure in Virginia predate the enactment of Virginia Code 8.01-675.2, and by equally well settled Virginia law, the Virginia legislature is presumed to be cognizant of the decisions of the Virginia Supreme Court and acquiesces in such decisions unless the legislation subsequently passed concerning the subject matter explicitly countermands a decision of that Court. *Cape Henry v. Natl. Gypsum*, 229 Va. 596, 600-601, 331 S.E. 2d 476, 479 (1985); *Burns v. Stafford County*, 227 Va. 354, 360, 315 S.E. 2d 856, 860 (1984); *McFadden v. Commonwealth*, 3 Va. App. 226, 230, 348 S.E. 2d 847, 849 (1986); *McFadden v. McNorton*, 193 Va. 455, 461, 69 S.E. 2d 445, 449 (1952). The omission of the term *de novo* in Virginia Code 8.01-675.2 governing rehearings by the Virginia Supreme Court, taken in the context of the use of the term *de novo* in statutes governing other judicial appeals compels the conclusion that the legislature intended no departure from the purpose and burdens of the rehearing procedure as stated in the decided cases.

2. Respondent's new argument that petitioner misunderstood the rehearing process is contradicted by the facts.

Respondent, at page 7, paragraph 1, of its brief in opposition suggests that petitioner "initially misunderstood the process, because the question before the Virginia court was solely a question of law . . ." This statement is at once demonstrably false and confusing.

Petitioner is not certain what respondent means by stating that the question at the rehearing was "solely a matter of law." The only attempt respondent makes to define the question of law giving rise to the rehearing is found at page 4 of the brief in opposition where respondent refers to "the far reaching implications of the majority opinion [of April 19, 1991]." This is hardly sufficient because anytime the highest appellate court of a State issues an opinion, the implications are "far reaching."

As to the genuine questions of law involved in the case, all these were resolved by the April 19, 1991 opinion, thus leaving for consideration upon rehearing only new questions of law which had not been available to be raised in the original hearing. But as petitioner, and, more significantly, Virginia Supreme Court Justices Whiting, Stephenson, and Senior Justice Poff have observed, no new question of law relating to the substance of the case was raised by respondent, much less briefed or argued at any point in the rehearing.

It is disingenuous to argue, as respondent attempts to do by innuendo, that petitioner in any way misunderstood the rehearing procedures as they existed up until September 11, 1991. Petitioner thoroughly understood these procedures, just as did the Supreme Court of Virginia when on September 11, 1991, just five days before oral argument, it notified petitioner that the rehearing procedure was suddenly being changed. (Appendix A hereto)

The fact that this letter was sent is conclusive evidence of the fact that the Virginia Supreme Court was acutely aware that it was changing its rules of procedure at the last minute and was abruptly departing from long established and well understood procedures; procedures which the present justices themselves had reiterated as recently as some three months before at the referenced meeting in Richmond, Virginia on June 18, 1991. (It should be noted here that although respondent, at pages 7–8 of its brief in opposition, seems to suggest that this Richmond meeting did not have the official imprimatur of the entire court, and that only a single justice made the remarks concerning rehearings, this is not true, for *all* justices of the Virginia Supreme Court participated in this meeting and the handbook quoted from was issued with their approval and was not contradicted at any time during the many discussions involving all the Virginia justices.)

This change in procedure meant far more than changing the order of argument as respondent would have this Court believe. This last minute abrogation of procedure by the Virginia court, changed the issues to be argued at the rehearing and switched the burden of proof. Under rehearing procedures as they existed up until September 11, 1991, respondent had the burden of proof of arguing some new development of law since the hearing which led to the April 19, 1991 decision. Instead, at almost literally the last minute, when petitioner no longer had an opportunity to rebrief the case, and with little opportunity to adjust argument to the abruptly and mysteriously changed rules, petitioner was suddenly charged with rearguing the entire case from "square one", and before a suspiciously convenient reorganized *banc* of justices.

3. Respondent's new argument that the issue before this Court concerns the lower court's composition in "any particular case" is bogus and an attempt to divert this Court's attention from the due process issue presented.

At page 8, paragraph 3, of its brief in opposition, respondent states that "[t]he method used by a state court to determine whether regular sitting justices will sit in any particular case does not create a federal question." Were this the issue actually posed, petitioner would have to agree. But that is not the issue. Because of the rarity, it is proper to label a rehearing an extraordinary proceeding. The issue posed here is not directed to regular appellate hearings, but is whether *after a case has been decided* federal due process requires that on a rehearing of the case only those justices or judges who participated in the original should take part (with, of course, the burden on the party seeking rehearing to meet the long established burdens of proof).

4. Respondent, without support of any authority, is asking this Court to divest itself of jurisdiction for review of state court adherence to the federal Due Process Clause required by 28 USC 1257 (a) and Amendment XIV to the Constitution of the United States.

At page 8, paragraph 4, of its brief in opposition, respondent argues that if the state court believes its action complies with statutory procedural requirements, then the state court determination is binding on this Court. (At page 5 of the brief in opposition, in lines three and four of the first partial paragraph, respondent appears to suggest that action by the clerk of the state court is sufficient to divest this Court of jurisdiction over questions of compliance with federal due process requirements.) Put another way, respondent is arguing no less than that this court should abandon a long line of previous decisions, including those cited in petitioner's petition for writ of certiorari, and surrender to state courts the jurisdiction and authority to determine whether the state's (and that court's) judicial procedures meet federal due process requirements under Amendment XIV. What respondent urges would nullify 28 USC 1257(a) and be an abdication of the established and statutory jurisdiction of this Court. The magnitude of the interpretation of law respondent

urges this Court to adopt is surpassed only by the absurdity of the request itself.

5. Respondent's argument that petitioner had the opportunity to brief her case prior to oral argument at the rehearing is untrue.

At page 8, last full paragraph, of the brief in opposition, respondent argues that petitioner "was given the opportunity to brief the case prior to the second argument." This is either a misprint or respondent is deliberately attempting to falsify facts and mislead this Court.

The rehearing was granted *ex parte* on June 4, 1991. Petitioner had 30 days from that time to file her brief in reply, but requested additional time, which was granted, with the petitioner's brief in reply being filed on July 13, 1991. The change in procedures denying petitioner due process, however, was not announced until September 11, 1991, some two months after the filing of her brief in reply, and a scant five days prior to oral argument. Even had the petitioner's counsel filed a revised brief in this short space of time prior to oral argument, such filing would have been futile because the Rule 5:39 of the Virginia Supreme Court governing rehearing only provides for filing of the brief in reply filed in July.

Petitioner agrees with this Court's ruling in *Matthews v. Eldridge*, 242 U.S. 319, 33 (1976), cited by respondent at page 8 of the brief in opposition, that fundamental due process requires the right to be heard at a meaningful time and in a meaningful manner. It is precisely these due process requirements which were violated by the Virginia court in a blatant and cynical manner which rendered the September 16, 1991 rehearing a procedure more akin to the "show trials" of totalitarian countries,

than to a proceeding under the laws and constitutions of Virginia and the United States of America.

Respectfully submitted,

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CERTIFICATE

I hereby certify that this 13th day of May, 1992, forty copies of this Reply Brief of the Petitioner, Marcia P. Dykes, were filed in the Clerk's Office, and three copies mailed to William G. Broaddus, One James Center, Richmond, Virginia 23219, 804/-775-1000; A. Francis Robinson, One World Trade Ctr., New York, NY 10048, 212/839-5323, counsel for respondent, Northern Virginia Transportation District Commission; and Robert L. Howell, Acting County Attorney, 12000 Government Center Parkway, Suite 549, Fairfax, VA 22035, 703/324-2421, counsel for Board of Supervisors of Fairfax County, Virginia.

Fredrick H. Goldbecker

APPENDIX

APPENDIX A

SUPREME COURT OF VIRGINIA
Supreme Court Building
Richmond, Virginia 23219
804-786-2251

September 11, 1991

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Re: Marcia P. Dykes
v. Northern Virginia Transportation District Commission, et al.
Record No. 901033

Re: Osgood Tower
v. Northern Virginia Transportation District Commission, et al.
Record No. 901037

Counsel:

The Court has instructed me to inform you that, because the opinion was withdrawn in these cases, counsel will be permitted to argue all assignments of error contained in the opening briefs, and are not limited to the issues addressed in the Court's opinion. Accordingly, the appellants will argue first and the time allotted to argument has been increased to 60 minutes to be divided evenly between appellants and appellees.

Feel free to contact me if you have any questions.

Sincerely,

Patricia H. Krueger
Chief Deputy Clerk

PHK:slh

cc: Scott A. Mills, Esq.
James H. Falk, Sr., Esq.
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